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EXAMINER	
CLARK, AMY LYNN	

  

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1655	

  

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

Application No.

10/523,333

Applicant(s)

LINTNER, KARL

Examiner

Amy L. Clark

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 02 April 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 12-15, 17-22 and 24-29 is/are pending in the application.
- 4a) Of the above claim(s) 18, 20 and 25-29 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 12-15, 17, 19, 21, 22 and 24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- 1) ☒ Certified copies of the priority documents have been received.
  - 2) ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - 3) ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>12/07/2005</u> .  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

Acknowledgment is made of the receipt and entry of the amendment filed on January 11, 2005 with the cancellation of claims 16 and 23, and newly amended claims 12, 17, 24 and 19 Claims 4-6.

### ***Election/Restrictions***

Applicant's election with traverse of Group I, Claims 12-27 in the reply filed on 4 December 2006 and Applicant's election of black tea as Specie A, liposome as Specie B, formulation for skin care as Specie C and surfactant as Specie D filed on 2 April 2007 is acknowledged. The traversal is on the grounds that Applicant asserts that this restriction for lack of unity is improper in accordance with the decision in Caterpillar Tractor Co. v. Commissioner of Patents and Trademarks, 231 USPQ 590 (E.D. Va. 1986). Indeed, "when the Office considers international applications as an International Searching Authority, as an International Preliminary Examining Authority, and during the national stage as a Designated or Elected Office under 35 U.S.C. 371, PCT Rule 13.1 and 13.2 will be followed when considering unity of invention of claims of different categories without regard to the practice in applications filed under national 35 U.S.C. 111". Applicant further argues that it is Applicant's position that there is unity of invention and that the restriction and the election are improper. Applicant further argues that in the alternative, however, Applicant would elect the invention of Group I, which corresponds to claims 12-27. Applicant further argues that Applicant would elect Specie A from claim 13 -- the black tea plant from which kombucha is derived and that this

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election is made with traverse, as the respective searches appear to be substantially coextensive for each of Groups I-III. Applicant further argues in view of the current amendment reciting the specific amounts at which the kombucha may be present, this common technical feature links each of claims 12-27. Applicant further argues that this common technical feature of the invention is neither anticipated nor rendered obvious by Sarill et al. (US 6,274,564). Applicant further argues that in view of the foregoing amendment, notwithstanding the different classifications of the claims of Group I, II and III, the "inventions" in these groups are related, and the respective searches would appear to be substantially coextensive is respectfully submitted that a search for one "invention" will necessarily involve a search for the other as well.

This is not found persuasive for the reasons set forth in the previous Office Action and for the reasons set forth below.

Applicant's attention is directed to MPEP 1850 (II), which states:

"An international application should relate to only one invention or, if there is more than one invention, the inclusion of those inventions in one international application is only permitted if all inventions are so linked as to form a single general inventive concept (PCT Rule 13.1). With respect to a group of inventions claimed in an international application, unity of invention exists only when there is a technical relationship among the claimed inventions involving one or more of the same or corresponding special technical features. The expression "special technical features" is defined in PCT Rule 13.2 as meaning those technical features that define a contribution which each of the inventions, considered as a whole, makes over the prior art. The determination is made on the contents of the claims as interpreted in light of the description and drawings (if any).

Whether or not any particular technical feature makes a "contribution" over the prior art, and therefore constitutes a "special technical feature," should be considered with respect to novelty and inventive step. For example, a document discovered in the international search shows that there is a presumption of lack of novelty or inventive step in a main claim, so that there may be no technical relationship left over the prior art among the claimed inventions involving one or more of the same or corresponding

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special technical features, leaving two or more dependent claims without a single general inventive concept.

See also MPEP 1893.03(d):

“When making a lack of unity of invention requirement, the examiner must (1) list the different groups of claims and (2) explain why each group lacks unity with each other group (i.e., why there is no single general inventive concept) specifically describing the unique special technical feature in each group”.

The principles of unity of invention are used to determine the types of claimed subject matter and the combinations of claims to different categories of invention that are permitted to be included in a single international or national stage patent application. See MPEP § 1850 for a detailed discussion of Unity of Invention. The basic principle is that an application should relate to only one invention or, if there is more than one invention, that applicant would have a right to include in a single application only those inventions which are so linked as to form a single general inventive concept.

A group of inventions is considered linked to form a single general inventive concept where there is a technical relationship among the inventions that involves at least one common or corresponding special technical feature. The expression special technical features is defined as meaning those technical features that define the contribution which each claimed invention, considered as a whole, makes over the prior art. For example, a corresponding technical feature is exemplified by a key defined by certain claimed structural characteristics which correspond to the claimed features of a lock to be used with the claimed key.”

Claim 1, at least, is anticipated by or obvious over Sarill et al. (A\*, US 6,274,564 B1) because Sarill teaches a composition for topical application comprising kombucha and milk or milk products (See column 16, lines 21-49). Consequently, the special technical feature which links the claims does not provide a contribution over the prior art, so unity of the invention is lacking.

Although Sarill does not expressly teach the amounts of kombucha claimed by Applicant, Sarill provides a basis for a 103(a) rejection (please note that the above paragraph states, “Claim 1, at least, is anticipated **or obvious over...**”), and therefore,

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the application of Sarill as a reference showing lack of unity is perfectly acceptable and appropriate, irrespective of whether Sarill teaches exact amounts of kombucha in a composition.

In response to Applicant's argument that the species should be examined together because there is no burden on the Examiner, please note that the species lack a common core structure and a search for one is not co-extensive with a search for all others.

Finally, in response to Applicant's argument that these Inventions would be classified together, and no burden exists in searching for all inventions and species together, please note that this argument is only applicable to US cases and not 371 cases. The basis for election restrictions for 371 cases is lack of unity, which was established above and in the previous Office Action and with respect to the species election, the requirement hinges on whether all species share a common core structure or function, which has been established as lacking, as explained above.

Therefore, the requirement is still deemed proper and is therefore made **FINAL**.

Claims 12-15, 17-22 and 24-29 are currently pending.

Claims 18, 20, 25 and 27-29 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected inventions, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on 4 December 2006.

**Claims 12-15, 17, 19, 21, 22 and 24 are under examination.**

### ***Information Disclosure Statement***

The information disclosure statement (IDS) was submitted on 7 December 2005. The submission is in compliance with the provisions of 37 CFR 1.97. Accordingly, the information disclosure statement is being considered by the examiner.

Please note that in the cases of references BD (FR 1,477,048 A), BE (FR 2,091,516 A), and BI (FR 2,482,126 A1) (All foreign patents), and CG (Frank) and CH (Hager) (both non-patent literature), these references were not considered because Applicant did not provide a translation into English of any part of any of these references.

### ***Specification***

35 U.S.C. 112, first paragraph, requires the specification to be written in "full, clear, concise, and exact terms." The specification is replete with terms which are not clear, concise and exact. The specification should be revised carefully in order to comply with 35 U.S.C. 112, first paragraph. Examples of some unclear, inexact or verbose terms used in the specification are: "to improve its (the skin's) appearance and the feeling of comfort, to carry out cosmetic "lipofilling", "to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin", "the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages" (See specification, page 17, lines 7-30). In the case of "mat skin" does Applicant mean

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"matted skin" or "matte"? Please check the spelling of each term, too, for the appropriate English spelling. Please further note that these are only a few examples of terms that are unclear or possibly misspelled (in the case of "mat skin"). The entire specification contains descriptions that are ambiguous and confusing. For example, page 1 (in particular lines 9-32) contains numerous phrases that are unclear, such as "the skin, mucous membranes, and the skin appendages are fragile elements which deserve the greatest regards" (page 1, lines 9 and 10). Also, please define what CTFA is (See page 10, line 22, wherein Applicant discloses, "The CTFA Cosmetic Ingredient Handbook"). Please also check to make sure that the proper modifiers and coordinating conjunctions are placed in the sentence. For example, "available under name MATRIXYL ®" (See page 13, lines 10 and 11) should be corrected to read "available under the name MATRIXYL®" and please write as STEROCARE® (page 14, line 28) as as "as STEROCARE®". The Examiner has not pointed out all ambiguous phrases, but has provided Applicant with a handful of examples. Applicant must revise the entire specification and to clarify what Applicant is disclosing without introducing new matter.

A substitute specification in proper idiomatic English and in compliance with 37 CFR 1.52(a) and (b) is required. The substitute specification filed must be accompanied by a statement that it contains no new matter.

The use of the following trademarks: ac.net® (page 12, line 6), CALMOSENSINE® (page 13, line 4), MATRIXYL® (page 13, line 10), TROLOX® (page 13, line 10), VENUCEANE® (page 13, line 27), MELASLOW®, LUMISKIN®,



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ETOLINE® (page 14, line 22), BACOCALMINE® (page 14, line 26), STEROCARE® (page 14, line 28), Volpo S20, Volpo S2, Prostearyl 15 (page 18, Example No 2, first three ingredients), Crodacol C90, Lubrajel® MS (page 19, lines 4 and 5), Empicol ESB3/M, INCRONAM 30, CROTHIX Liquid, Phenova (page 19, lines 15-18), Proetyl AWS, and Nipagine (page 19, lines 27 and 28) has been noted in this application. It should be capitalized wherever it appears and be accompanied by the generic terminology. Please note that the following trade names are not defined anywhere in the specification: Volpo S20, Volpo S2, Prostearyl 15, Crodacol C90, Lubrajel® MS, Empicol ESB3/M, INCRONAM 30, CROTHIX Liquid, Phenova, Proetyl AWS, and Nipagine.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks. Please further note that if Applicant choose to include trade names in the claims, this will render the claim scope uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. See MPEP § 608.01(b).

### ***Claim Objections***

Claims 14 and 15 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim.

Applicant is required to cancel the claim, or amend the claim to place the claim in proper dependent form, or rewrite the claim in independent form. Claim 14 recites the same ingredients listed in claim 13, however, claim 14 appears to be dependent upon claim 14. Either claim 14 is dependent upon the wrong claim number or claim 14 is redundant. Furthermore, claim 14 is missing a period at the end of the claim (line 4). Since claim 15 depends on improperly dependent claim 14, claim 15 is also improperly dependent. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 12-15, 17, 19, 21, 22 and 24 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claims contain subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Enablement is considered in view of the *Wands* factors (MPEP 2164.01(A)).

These include: nature of the invention, breadth of the claims, guidance of the

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specification, the existence of working examples, state of the art predictability of the art and the amount of experimentation necessary. All of the Wands factors have been considered with regard to the instant claims, with the most relevant factors discussed below.

*Nature of the Invention:* The claims are drawn to a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition.

*Breadth of the Claims:* The claims are broad in that a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition may be administered to prevent the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages (See page 1, lines 4-31 and page 17, lines 7-30). The complex nature of the subject matter of this invention is greatly exacerbated by the breadth of the claims.

*Guidance of the Specification and Existence of Working Examples:* The specification describes a method of making a preparation of kombucha (See page 18, "Example No. 1"), a composition of day cream, gel, shampoo and hair spray comprising kombucha in an amount of 3 grams, 0.5 grams and 10 grams (See pages 18-20, Examples 2-4), an *in vitro* study on the anti-glucation effect of aminoguanidine (0.03%) and of KOMBUCHA (1% and 3%) (See pages 20 and 21, "Example No 6: Anti-glycation effect" and an *in vitro* study on the stimulation of cultured adipocyte differentiation using KOMBUCHA in an amount of 0.3%, 1% and 3% (See pages 21 and 22, "Example No 7: Stimulation of cultured adipocyte differentiation").

The specification envisions that a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition will have utility in humans in preventing the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages.

However, no working examples are provided with regard to a method for

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preventing the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages. Furthermore, no working examples are provided that demonstrate the efficacy of a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition in preventing the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages.

*Predictability and State of the Art:* The state of the art at the time the invention was made was unpredictable and underdeveloped. For example, Jenkins (U, Molecular mechanisms of skin ageing. Mechanisms of Aging and Development Vol. 123, no. 7 (April 2002), pp 801-810) teaches that cutaneous ageing is a complex biological phenomenon consisting of two components: intrinsic ageing, which is largely genetically determined and extrinsic ageing, caused by environmental exposure (primarily UV light). Jenkins further teaches that it is clear that there are readily discernible differences between intrinsically aged skin and that aged by habitual exposure to sunlight, particularly at the macromolecular level. Jenkins further teaches that now that molecular mechanisms underlying the skin's response to UV are beginning to be identified, they are also likely to provide further insights into those processes, which determine tissue aging in general and better strategies to protect skin against the undesirable effects of both sunlight and passage of time may soon follow (See abstract, page 801, and conclusions, page 807). Therefore, since the mechanisms behind intrinsic and extrinsic aging were only just being illuminated, it is impossible to prevent endogenous and/or exogenous aging.

Thus, while the claim-designated method may be useful for providing such an effect, Applicant does not disclose a method comprising the administration of a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition, wherein the composition demonstrates that it will have utility in humans in preventing the signs of

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endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages. The Office further notes that while the specification discloses that the claim-designated methods and claim designated composition will have utility in humans in preventing the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages, nowhere in the specification or in the limitations does Applicant direct the claimed subject matter to the administration of a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said

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composition to any subject.

It should be noted that at the time of filing of the present application, the art of medicine did not recognize the administration of a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition for preventing the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages, comprising the step of administering a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition, wherein said composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition prevents the signs of endogenous and/or exogenous aging, restores suppleness and elasticity to the skin, improves its appearance and the feeling of



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comfort, carries out cosmetic "lipofilling", firms the skin of the face, hips, thighs, invigorates the texture of the skin, recovers matter of the skin, recovers the full forms of a young face, restores the volume of skin, restores the freshness of the complexion, increases radiance, treats wrinkles and/or the fine lines, cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, deterioration (or the collapse) of cutaneous microrelief, flask skin, mat skin, and cares for the skin, mucosae and skin appendages in humans.

*Amount of Experimentation Necessary:* The quantity of experimentation necessary to carry out the claimed invention is high, as the skilled artisan could not rely on the prior art or instant specification to teach how to make and use a composition for topical application comprising: kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition in preventing the signs of endogenous and/or exogenous aging, to restore suppleness and elasticity to the skin, to improve its appearance and the feeling of comfort, to carry out cosmetic "lipofilling", to firm the skin of the face, hips, thighs, to invigorate the texture of the skin, to recover matter of the skin, to recover the full forms of a young face, to restore the volume of skin, to restore the freshness of the complexion, to increase radiance, to treat wrinkles and/or the fine lines, the cutaneous and/or under-cutaneous sagging of the skin of the hips, of the thighs, the deterioration (or the collapse) of cutaneous microrelief, the flask skin, the mat skin, and care of the skin, mucosae and skin appendages in humans. In order to carry out the claimed invention, one of ordinary skill in the art would have to

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identify compositions comprising kombucha and a cosmetically acceptable carrier mixed with said kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition that can be administered in a therapeutically effective dose with an acceptable level of side-effects..

In view of the breadth of the claims and the lack of guidance provided by the specification as well as the unpredictability of the art, the skilled artisan would have required an undue amount of experimentation to make and/or use the claimed invention. Therefore, Claims 12-15, 17, 19, 21, 22 and 24 are not considered to be fully enabled by the instant specification.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 12-15, 17, 19, 21, 22 and 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The metes and bounds of Claim 12 are rendered uncertain by the phrase "A composition for topical application comprising: kombucha, wherein said kombucha is present in an amount of 0.001% (w/w) to 100% (w/w) of the total weight of said composition" because if the kombucha is present in an amount of 100% (w/w) of the total weight of the composition, then this means that the composition only contains kombucha and cannot further comprise a cosmetically acceptable carrier. The lack of clarity renders the claims indefinite since the resulting claims do not clearly set forth the

metes and bounds of the patent protection desired.

The metes and bounds of Claims 13 and 14 are rendered uncertain by the phrase "The composition of claim 12, wherein said kombucha is derived from green tea, semi-fermented tea, black tea, smoked black tea, yellow tea, dark tea, white tea, herb tea of plants or of fruits, or an infusion thereof" because it is unclear as to the identification of the ingredients to which Applicant intends to direct the subject matter. First of all, what does Applicant mean by "herb tea of plants or of fruits" in line 4? Is Applicant claiming an herbal tea made from plants or fruits or is Applicant claiming that the plants or fruits contain herb teas? Secondly, what does Applicant mean by "semi-fermented tea", "smoked black tea", "yellow tea" and "dark tea"? In the case of "semi-fermented" does Applicant mean that tea is only semi-fermented with yeast to form partial kombucha or is Applicant referring to something else? What is "smoked black tea"? Is that tea that has been smoked like a cigarette or tea that has been subjected to a smoking process, like the process used to smoke meats or something else? What is "yellow tea". Is "yellow tea" referring to a specific species of tea or the color of a drink made by infusing tea leaves or something else? What does Applicant mean by "dark tea". Arguably, all tea is dark when looking at the contents of tea in a canister or bag. Is Applicant referring to the color of tea or to a species of tea or to the color the tea makes the water when it is infused. Finally, although the use of common names or traditional/ethnopharmacological names is permissible in patent applications, the standard Latin genus-species name of each ingredient should accompany non-technical nomenclature as a means for identifying the subject botanical as noted in this

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application. The common name or traditional/ethanopharmacological name may have several different Latin names referring to various genus-species of the plant and it is unclear as to which genus and species Applicant is referring. The lack of clarity renders the claims indefinite since the resulting claims do not clearly set forth the metes and bounds of the patent protection desired. Applicant may overcome the rejection by placing the genus-species name of "green tea", "semi-fermented tea", "black tea", "smoked black tea", "yellow tea", "dark tea", "white tea" and "herb tea of plants or of fruits" in parentheses after the term "green tea", "semi-fermented tea", "black tea", "smoked black tea", "yellow tea", "dark tea", "white tea" and "herb tea of plants or of fruits". Please make sure to write the Latin name in the proper format, wherein the first word is capitalized, the second word is lowercase and the entire name is italicized. Please also note that in the case that "semi-fermented tea", "smoked black tea", "yellow tea" and "dark tea" are all the same species of tea, just with different processes applied to them to change the tea's properties, simply adding a genus and species name is not enough to overcome the 112 2<sup>nd</sup> rejection. Applicant is advised to better define each type of tea by changing the wording of the claim language. The same applies to simply placing a genus and species name next to "herb tea of plants or of fruits". Again, since this term is so ambiguous, Applicant is required to change the language to better reflect what exactly this ingredient is.

The metes and bounds of claim 21 are rendered uncertain by the phrase "The composition of claim 12, wherein said mixture of kombucha and a cosmetically acceptable carrier is a formulation for skin care or hair care, a make-up-removing base,

a foundation tint base, a sun-screen, an artificially suntan base, a shaving base, an aftershave, shampoo, lipstick, mascara or nail varnish” because it is unclear if Applicant means that the kombucha and cosmetically acceptable carrier are part of a formulation for skin care or if the composition itself is a formulation for skin care. The lack of clarity renders the claims indefinite since the resulting claims do not clearly set forth the metes and bounds of the patent protection desired.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 12, 17, 21 and 24 are rejected under 35 U.S.C. 102(a) as being anticipated by [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) (V).

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html)

teaches a skin toner comprising 4 ounces of kombucha tea that is fermented for 14 days and further comprising aloe vera in an amount of ¼ cup, vitamin C powder in an amount of ¼ teaspoon and a drop or two of vitamin E oil (See pages 1 and 2).

Therefore, the reference anticipates the claimed subject matter.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 12-15, 17, 21 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) (V), in view of Blanc (W, "Characterization of the Tea Fungus Metabolites". Biotechnology Letters, Vol. 1, No. 2 (February 1996), pp. 139-142) and [http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea) (X, "Kombucha Tea". Medicinal Food News. No. 16 (October 1996), page 1).

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) teaches a skin toner comprising 4 ounces of kombucha tea that is fermented for 14 days and further comprising aloe vera in an amount of ¼ cup, vitamin C powder in an amount of ¼ teaspoon and a drop or two of vitamin E oil.

Blanc teaches that tea fungus (kombucha) is a symbiotic culture of at least three microorganisms and that kombucha is traditionally grown on black tea with sucrose for 7 days and that longer incubations results in increasing production of acetic acid and in the formation of a mild vinegar (See "Summary" and "Introduction" on page 139).

[http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea) teaches that kombucha tea is produced by the fermentation of sweetened black tea and carried out by a kombucha mushroom or tea-fungus.

[http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea) further teaches that kombucha tea is useful for treating skin conditions including acne and psoriasis.

The teachings of

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html), Blanc and [http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea) are set forth above.

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) does not teach that kombucha is derived from black tea. However, at the time the invention was made, it would have been obvious to one of ordinary skill in the art and one would have been motivated and had a reasonable expectation of success to modify the composition taught by [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) to provide the instantly claimed invention because at the time the invention was made, a skin toner comprising 4 ounces of kombucha tea that is fermented for 14 days and further comprising aloe vera in an amount of ¼ cup, vitamin C powder in an amount of ¼ teaspoon and a drop or two of vitamin E oil was known, as clearly taught by [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html), as was that tea fungus (kombucha) is a symbiotic culture of at least three microorganisms and that kombucha is traditionally grown on black tea with sucrose for 7 days and that longer incubations results in increasing production of acetic acid and in the formation of a mild vinegar, as clearly taught by Blanc, as was that that kombucha tea is produced by the fermentation of sweetened black tea and carried out by a kombucha mushroom or tea-fungus and that that kombucha tea is useful for treating skin conditions including acne and psoriasis, as clearly taught by

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[http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea). Since it was known in the art that the most common kombucha is that grown on black tea and that black tea kombucha is useful for treating skin and skin conditions, such as acne and psoriasis, it would have been obvious to use kombucha grown on black tea in the composition taught by [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html).

Based upon the beneficial teachings of the cited references, the skill of one of ordinary skill in the art, and absent evidence to the contrary, there would have been a reasonable expectation of success to result in the claimed invention.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Claims 12, 17, 19, 21, 22 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) (V), in view of [http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm) (U1, 'Liposomes: Innovative concepts lead to success'), [http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm) (V1, 'Elizabeth Renee Esthetics: natural skincare and day spa' page 3), Delrieu et al. (B, US Patent Publication Number: 5,962,015) and Förster et al. (W1, 'Lipid/Surfactant Compounds as a New Tool to Optimize Skin-Care Properties of Personal-Cleansing Products'. Journal of Surfactants and Detergents, Vol. 3, No. 3 (July 2000), pp 245-352).



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The teachings of

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) are set forth above and applied as before.

[http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm) teaches that liposomes are typical vehicles that are able to transport dermatological and cosmetic active agents of different types, wherein the active agents are encapsulated and protected against environmental influence, that liposomes spread out in the horny layer of the skin and form depots of active agents.

[http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm) teaches a hydrating vitamin crème comprising aloe vera gel, dimethicone (a surfactant) and stabilized vitamins A, C and E (liposomes).

Delrieu teaches that lecithin-type liposomes provide excellent stability for cosmetic and pharmaceutical compositions. Delrieu further teaches that liposomes can serve as vectors for alpha-hydroxy acids and show no aggregation even after several months of storage at pH 2 (See abstract). Delrieu further teaches that some agents that may be incorporated into the liposomes of the invention comprise antioxidants, free radical scavengers, topically active enzymes, antioxidants, exfoliative retinoids, such as retinol and retinol esters, purified plant extracts and plant proteins, animal proteins, such as collagen, moisturizers, and perfumes (See column 7, lines 20-37). Delrieu further teaches that liposomes and incorporated ingredients may be incorporated into cosmetic formulations in the form of cream, lotion, toners, astringents, powders and skin cleansing compositions (See column 7, lines 59-66). Delrieu further teaches that these

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lecithin-type liposomes may be combined with surfactants and that they are stable in the presence of surfactants (See column 10, "Test D: Solvent and Surfactant Stability").

Förster teaches that surfactants are commonly used in personal care products to increase cleansing performance and to create foam. Förster further teaches that surfactants can also damage skin by removing skin lipids, resulting in skin roughness and transepidermal water loss. Förster further teaches that surfactant-compatible lipid compounds has provided a convenient way of not only counteracting the negative side effects of surfactants but also exerting positive skin effects (See page 345, "Abstract").

The teachings of

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html),

[http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm),

[http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm), Delrieu and Förster

are set forth above. [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html)

[hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) does not teach that kombucha may be part of or contained in a liposome, nor

does [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) teach

a composition comprising kombucha, a cosmetically acceptable carrier and a surfactant.

However, at the time the invention was made, it would have been obvious to one of

ordinary skill in the art and one would have been motivated and had a reasonable

expectation of success to modify the composition taught by

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) to provide

the instantly claimed invention because at the time the invention was made, a skin toner

comprising 4 ounces of kombucha tea that is fermented for 14 days and further

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comprising aloe vera in an amount of ¼ cup, vitamin C powder in an amount of ¼ teaspoon and a drop or two of vitamin E oil was known, as was that kombucha could be combined with the same ingredients combined to make a facial toner to make a facial masque, as clearly taught by

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html), as was

that liposomes are typical vehicles that are able to transport dermatological and cosmetic active agents of different types, wherein the active agents are encapsulated and protected against environmental influence, that liposomes spread out in the horny layer of the skin and form depots of active agents, as clearly taught by

[http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm), as was a

hydrating vitamin crème comprising aloe vera gel, dimethicone (a surfactant) and stabilized vitamins A, C and E (liposomes), as clearly taught by

[http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm), as was that lecithin-

type liposomes provide excellent stability for cosmetic and pharmaceutical

compositions, that liposomes can serve as vectors, that active agents may be

incorporated into the liposomes of the invention, such as antioxidants, free radical

scavengers, topically active enzymes, antioxidants, exfoliative retinoids, such as retinol

and retinol esters, purified plant extracts and plant proteins, animal proteins, such as

collagen, moisturizers, and perfumes, that liposomes and incorporated ingredients may

be incorporated into cosmetic formulations in the form of cream, lotion, toners,

astringents, powders and skin cleansing and that liposomes may be combined with

surfactants and that they are stable in the presence of surfactants, as clearly taught by

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Delrieu, as was that that surfactants are commonly used in personal care products to increase cleansing performance and to create foam, that surfactants can also damage skin by removing skin lipids, resulting in skin roughness and transepidermal water loss. Förster further teaches that surfactant-compatible lipid compounds has provided a convenient way of not only counteracting the negative side effects of surfactants but also exerting positive skin effects, as clearly taught by Förster.

It has been held that combinations of two or more compositions each of which is taught by the prior art to be useful for the same purpose in order to form a third composition which is to be used for the very same purpose. In re Susi, 58 CCPA 1074, 1079-80, 440 F.2d 442, 445, 169 USPQ 423, 426 (1971); In re Crockett, 47 CCPA 1018, 1020-21, 279 F.2d 274, 276-77, 126 USPQ 186, 188 (1960). As the court explained in Crockett, the idea of combining them flows logically from their having been individually taught in prior art. Therefore, since each of the references teach kombucha, aloe vera, liposomes, and surfactants are effective ingredients in compositions for treating skin and that liposomes are an effective carrier of active ingredients across the skin barrier, therefore, it would have been obvious to combine these ingredients with the expectation that such a combination would be effective in skin care compositions. Thus, combining them flows logically from their having been individually taught in prior art.

Based upon the beneficial teachings of the cited references, the skill of one of ordinary skill in the art, and absent evidence to the contrary, there would have been a reasonable expectation of success to result in the claimed invention.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Claims 12-15, 17, 19, 21, 22 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) (V), in view of Blanc (W, "Characterization of the Tea Fungus Metabolites". Biotechnology Letters, Vol. 1, No. 2 (February 1996), pp. 139-142) and [http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea) (X, "Kombucha Tea". Medicinal Food News. No. 16 (October 1996), page 1), [http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm) (U1, 'Liposomes: Innovative concepts lead to success'), [http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm) (V1, 'Elizabeth Renee Esthetics: natural skincare and day spa' page 3), Delrieu et al. (B, US Patent Publication Number: 5,962,015) and Förster et al. (W1, 'Lipid/Surfactant Compounds as a New Tool to Optimize Skin-Care Properties of Personal-Cleansing Products'. Journal of Surfactants and Detergents, Vol. 3, No. 3 (July 2000), pp 245-352).

The teachings of [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) are set forth above and applied as before.

The teachings of Blanc are set forth above and applied as before.

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The teachings of [http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea) are set forth above and applied as before.

The teachings of [http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm) are set forth above and applied as before.

The teachings of [http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm) are set forth above and applied as before.

The teachings of Delrieu are set forth above and applied as before.

The teachings of Förster are set forth above and applied as before.

The teachings of [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html), Blanc, [http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea), [http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm), [http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm), Delrieu and Förster are set forth above. [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) does not teach that kombucha is derived from black tea, nor does [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) teach that kombucha may be part of or contained in a liposome, nor does [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) teach a composition comprising kombucha, a cosmetically acceptable carrier and a surfactant. However, at the time the invention was made, it would have been obvious to one of ordinary skill in the art and one would have been motivated and had a reasonable

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[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html) to provide

the instantly claimed invention because at the time the invention was made, a skin toner

comprising 4 ounces of kombucha tea that is fermented for 14 days and further

comprising aloe vera in an amount of  $\frac{1}{4}$  cup, vitamin C powder in an amount of  $\frac{1}{4}$

teaspoon and a drop or two of vitamin E oil was known, as was that kombucha could be

combined with the same ingredients combined to make a facial toner to make a facial

masque, as clearly taught by

[http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html), as was

that tea fungus (kombucha) is a symbiotic culture of at least three microorganisms and

that kombucha is traditionally grown on black tea with sucrose for 7 days and that

longer incubations results in increasing production of acetic acid and in the formation of

a mild vinegar, as clearly taught by Blanc, as was that that kombucha tea is produced

by the fermentation of sweetened black tea and carried out by a kombucha mushroom

or tea-fungus and that that kombucha tea is useful for treating skin conditions including

acne and psoriasis, as clearly taught by

[http://www.medicinalfoodnews.com/vol01/issue5/k\\_tea](http://www.medicinalfoodnews.com/vol01/issue5/k_tea), as was that liposomes are

typical vehicles that are able to transport dermatological and cosmetic active agents of

different types, wherein the active agents are encapsulated and protected against

environmental influence, that liposomes spread out in the horny layer of the skin and

form depots of active agents, as clearly taught by

[http://web.archive.org/web/\\*/http://www.dr-lautenschlaeger.de/liposomes.htm](http://web.archive.org/web/*/http://www.dr-lautenschlaeger.de/liposomes.htm), as was a

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hydrating vitamin crème comprising aloe vera gel, dimethicone (a surfactant) and stabilized vitamins A, C and E (liposomes), as clearly taught by [http://web.archive.org/web/\\*/http://www.erespa.com/nightcrm.htm](http://web.archive.org/web/*/http://www.erespa.com/nightcrm.htm), as was that lecithin-type liposomes provide excellent stability for cosmetic and pharmaceutical compositions, that liposomes can serve as vectors, that active agents may be incorporated into the liposomes of the invention, such as antioxidants, free radical scavengers, topically active enzymes, antioxidants, exfoliative retinoids, such as retinol and retinol esters, purified plant extracts and plant proteins, animal proteins, such as collagen, moisturizers, and perfumes, that liposomes and incorporated ingredients may be incorporated into cosmetic formulations in the form of cream, lotion, toners, astringents, powders and skin cleansing and that liposomes may be combined with surfactants and that they are stable in the presence of surfactants, as clearly taught by Delrieu, as was that that surfactants are commonly used in personal care products to increase cleansing performance and to create foam, that surfactants can also damage skin by removing skin lipids, resulting in skin roughness and transepidermal water loss. Förster further teaches that surfactant-compatible lipid compounds has provided a convenient way of not only counteracting the negative side effects of surfactants but also exerting positive skin effects, as clearly taught by Förster. Since it was known in the art that the most common kombucha is that grown on black tea and that black tea kombucha is useful for treating skin and skin conditions, such as acne and psoriasis, it would have been obvious to use kombucha grown on black tea in the composition taught by [http://web.archive.org/web/\\*/http://users.bestweb.net/~om/kmi/skin-hair.html](http://web.archive.org/web/*/http://users.bestweb.net/~om/kmi/skin-hair.html).



It has been held that combinations of two or more compositions each of which is taught by the prior art to be useful for the same purpose in order to form a third composition which is to be used for the very same purpose. In re Susi, 58 CCPA 1074, 1079-80, 440 F.2d 442, 445, 169 USPQ 423, 426 (1971); In re Crockett, 47 CCPA 1018, 1020-21, 279 F.2d 274, 276-77, 126 USPQ 186, 188 (1960). As the court explained in Crockett, the idea of combining them flows logically from their having been individually taught in prior art. Therefore, since each of the references teach kombucha, aloe vera, liposomes, and surfactants are effective ingredients in compositions for treating skin and that liposomes are an effective carrier of active ingredients across the skin barrier, therefore, it would have been obvious to combine these ingredients with the expectation that such a combination would be effective in skin care compositions. Thus, combining them flows logically from their having been individually taught in prior art.

Based upon the beneficial teachings of the cited references, the skill of one of ordinary skill in the art, and absent evidence to the contrary, there would have been a reasonable expectation of success to result in the claimed invention.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

\* Applicant is advised that the cited U.S. patents and patent application publications are available for download via the Office's PAIR. As an alternate source, all U.S. patents and patent application publications are available on the USPTO web site ([www.uspto.gov](http://www.uspto.gov)), from the Office of Public Records and from commercial sources. Should you receive inquiries about the use of the Office's PAIR system, applicants may be referred to the Electronic Business Center (EBC) at <http://www.uspto.gov/ebc/index.html> or 1-866-217-9197.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amy L. Clark whose telephone number is (571) 272-1310. The examiner can normally be reached on 8:30am - 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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June 9, 2007

  
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